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6 Attorneys for Creditor
Sterling Savings Bank, successor in interest by merger to
7 Sonoma National Bank

8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 In Re:

12 BENYAM MULUGETA and PAULA R.
13 MULUGETA,

14 Debtors.

Case No. 09-51900
Chapter 11
R.S. No. RKN/004

Date: November 22, 2010

Time: 2:00 p.m.

Location: 280 South First St., San Jose, CA
Courtroom: 3020

15
16 **STERLING SAVINGS BANK'S REPLY TO DEBTORS' OPPOSITION TO MOTION FOR**
17 **RELIEF FROM STAY**

18 COMES NOW, Sterling Savings Bank, as successor in interest by merger to Sonoma
19 National Bank ("Sterling") and, replies to the Debtors' Opposition to Motion for Relief from Stay,
20 as follows:

21 The only two issues before this Court on this Motion are (1) whether the Debtors have
22 equity in the subject property, and (2) whether the property is necessary for an effective
23 reorganization. Sterling has the burden of proof on the issue of equity. The Debtors have the
24 burden of proving that the property is necessary for an effective reorganization. Sterling has met its
25 burden. The Debtors have not. This Motion should therefore be granted.

26 **A. THERE IS NO EQUITY IN THE PROPERTY.**

27 A debtor's equity in real property is the difference between the property value and the **total**
28 amount of liens against the property. (*Stewart v. Gurley* 745 F.2d 1194, 1195-96 (9th Cir. 1984).)

1 Here, Sterling has established that the Grand Property's value is \$2,700,000. A copy of Sterling's
2 appraisal is attached to the Declaration of appraiser, Stephen Kuhnhoff which was filed with the
3 initial reply papers for this Motion on March 30, 2010. Declarations of the appraisers involved in
4 the preparation of the appraisal demonstrate the validity and accuracy of the appraisal. The total
5 amount of liens against the Property is at least \$3,121,914. Accordingly, the Debtors have no
6 equity in the Property.

7 The Debtors' arguments to the contrary seemingly misunderstand the applicable law
8 regarding how a debtor's equity is determined. Whether or not Sterling is adequately protected is
9 not the issue. The issue is that the total amount of the liens against the Property far exceed the
10 appraised value of the Property. (*Stewart, supra* 745 F.2d at pp. 1195-96 (9th Cir. 1984).) The
11 Debtors also wholly disregard the declining state of the real estate market. Given the recent decline
12 in the real estate market, and particularly in the commercial real estate sector, it is not difficult to
13 understand that what an appraiser in December of 2008, may have thought property could be worth
14 in the future, is drastically different from what the property is actually worth a year later. Moreover,
15 even if the "As If Completed and Stabilized" value of \$3,380,000¹ were realistic in today's market,
16 the Debtors would still have no equity. The total amount of liens (\$3,121,914) plus the 8% in
17 commissions and sales costs (\$270,400) equals \$3,392,314. The Debtors simply have no equity,
18 and Section 362(d)(2)(A) is therefore satisfied.

19 **B. THE DEBTORS ARE NO CLOSER TO REORGANIZING NOW THAN**
20 **THEY WERE A YEAR AGO.**

21 The Debtors have not demonstrated, and cannot demonstrate, that the Grand Property is
22 necessary for an effective reorganization. The "effective reorganization" component in a motion for
23 relief from stay requires a showing by the debtor that a proposed plan is not patently unconfirmable
24 and has a realistic chance of being confirmed. (*In re Sun Valley Newspapers, Inc.* 171 B.R. 71, 75
25 (9th Cir. BAP 1994).) The burden of proof on a debtor in this regard is to "offer sufficient evidence
26 to indicate that a successful reorganization within a reasonable time is 'plausible.'" (*Ibid.*)) It is
27 not enough for the debtor to simply argue that the automatic stay should continue because it needs

28 ¹ See Debtors' Opposition at p. 2, line 18.

1 the property in order to propose a reorganization. (*La Jolla Mortgage Fun v. Rancho El Cajon*
2 *Assoc.*, 18 B.R. 283, 291 (Bankr. S.D. Cal. 1982); *see also, United Savings Assoc. of Texas v.*
3 *Timbers of Inwood Forest Assoc., Ltd.* 484 U.S. 365, 375-76.) “If all the debtor can offer at this
4 time is high hopes without any financial prospects on the horizon to warrant a conclusion that a
5 reorganization in the near future is likely, it cannot be said that the property is necessary to an
6 ‘effective’ reorganization.” (*Ibid.*) The lack of any realistic prospect for reorganization requires
7 relief under 11 U.S.C. 363(d)(2). (*United Savings Assoc. of Texas v. Timbers of Inwood Forest*
8 *Assoc., Ltd.* 484 U.S. 365, 376.)

9 Here, the Debtors have been in bankruptcy now for over eighteen months. In spite of
10 numerous chances, delays and promises, they have not sold a single piece of real property or come
11 close to proposing a plan of reorganization. This motion was originally filed on March 3, 2010.
12 After numerous delays and continuances, the Court ordered the Debtors to list this Property for sale
13 in May of 2010. They still have not sold it. As has been their pattern, they have presented a
14 purported sales contract on the eve of this hearing in an effort to buy more time. However, just as
15 with the O’Keefe and Harrison properties, absolutely no evidence exists to support a finding that
16 this sale is viable. Indeed, the purchase price stated in the purported offer, attached by the Debtors
17 as Exhibit 2, is \$2,475,000, \$646,914 less than the liens against the Property. Thus, absent consent
18 to a short sale by junior lenders, this sale will not happen.

19 In short, the Debtors have not proposed a plan and they have not demonstrated that they are
20 any closer to doing so today than they were a year ago. Rather, they have simply stalled and
21 delayed within the confines of the bankruptcy protections, without making any effort to file, much
22 less confirm, a plan. All the Debtors have done is argue that the automatic stay should continue
23 because they need the Property, and offer “high hopes” without any evidence of financial prospects
24 on the horizon which warrant a conclusion that reorganization in the future is likely. (*See La Jolla*
25 *Mortgage Fun v. Rancho El Cajon Assoc.*, 18 B.R. 283, 291 (Bankr. S.D. Cal. 1982); *see also,*
26 *United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.* 484 U.S. 365, 375-76.)
27 The inevitable conclusion to be drawn from the totality of the facts of this case is that no reasonable
28 prospect exists for reorganization of these Debtors in the near future. As such, it cannot be said that

1 the Property, **353 Grand Avenue, Oakland, CA 94601**, is necessary to an effective reorganization.
2 (*La Jolla Mortgage Fun v. Rancho El Cajon Assoc.*, 18 B.R. 283, 291 (Bankr. S.D. Cal. 1982); *see*
3 *also, United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., Ltd.* 484 U.S. 365, 375-
4 76.)

5 **III. CONCLUSION**

6 This motion has been pending for more than eight months, with absolutely no progress. The
7 Debtors have been given chance after chance to demonstrate that financial prospects exist to
8 warrant a conclusion that reorganization in the near future is likely. They have not done so.
9 Therefore, they have not demonstrated that this Property is necessary for an effective
10 reorganization. Sterling therefore urges this Court to issue an order granting relief from the
11 automatic stay to enable it to assert its rights under its deed of trust secured by the Debtors' property
12 located at **353 Grand Avenue, Oakland, CA; A.P.N. 010-0767-001**, as well as pursue all state
13 court remedies necessary to secure possession of the Property, including the serving of notices and
14 unlawful detainer proceedings. Sterling further requests a waiver of the 14-day stay imposed by
15 Bankruptcy Rule 4001(a)(3). Alternatively, at the very least, Sterling is entitled to relief to re-
16 publish its Notice of Sale, so that when the inevitable does happen, and Sterling is allowed to
17 foreclose, it need not wait an additional 30 days before doing so.

18
19 Dated: November 19, 2010

ABBEY, WEITZENBERG,
WARREN & EMERY

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21 By: /s/ Rachel K. Stevenson
22 Rachel K. Stevenson, Esq.
23 Attorneys for Sterling Savings Bank
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28

**SERVICE LIST
BENYAM AND PAULA MULUGETA
CASE NO. 09-51900**

DEBTOR:

Benyam Mulugeta
1025 Harker Ave.
Palo Alto, CA 94301

JOINT DEBTOR:

Paula R. Mulugeta
1025 Harker Ave.
Palo Alto, CA 94301

U.S. TRUSTEE:

Office of the U.S. Trustee / SJ
U.S. Federal Bldg.
280 S. 1st St., #268
San Jose, CA 95113-3004

CREDITORS:

Aglaia Panos

13240 Clairepointe Way
Oakland, CA 94619

California Mortgage

62 First St., 4th Fl
San Francisco, CA 94105

Capital One Bank (USA), N.A.

C/O Tsys Debt Management (Tdm)
PO BOX 5155
NORCROSS, GA 30091

Chase

PO Box 94014
Palatine, IL 60094

Chrysler Financial

PO Box 9001921
Louisville, KY 40290

Chrysler Financial Services Americas LLC

Randall P. Mroczynski
535 Anton Boulevard, 10th Floor
Costa Mesa, AZ 92626

1 **Citi**

2 PO Box 6415
3 The Lakes, NV 88901

4 **Countrywide Home Loans**

5 PO Box 5170
6 Simi Valley, CA 93062

7 **Cupertino Dental**

8 10383 Torre Ave. #I
9 Cupertino, CA 95014

10 **EMC**

11 PO Box 660753
12 Dallas, TX 75266

13 **Expo**

14 PO Box 6028
15 The Lakes, NV 88901

16 **Franchise Tax Board**

17 Bankruptcy Section MS A340
18 PO Box 2952
19 Sacramento, CA 95812-2952

20 **Internal Revenue Service**

21 P O Box 21126
22 Philadelphia, P A 19114

23 **Loan Oak Fund**

24 11611 San Vicente Blvd. #640
25 Los Angeles, CA 90049

26 **Robert Taylor**

27 541B Cowper
28 Palo Alto, CA 94301

Sequoia Mortgage

 1114 Irwin St.
 San Rafael, CA 94901

Sonoma Bank

 PO Box 6089
 Santa Rosa, CA 95406

1 **Tomoko Nakama**
1569 Jackson St.
2 Oakland, CA 94612

3 **Wachovia Dealer Services, Inc**
4 PO Box 25341
5 Santa Ana, CA 92799

6 **Washington Mutual**
7 PO Box 660487
Dallas, TX 75266

8 **Washington Mutual**
9 PO Box 74148
Phoenix, AZ 85062

10 **Washington Mutual Bank**
11 7301 Baymeadows Way
12 Jacksonville, FL 32256

13 **Wells Fargo**
14 PO Box 30086
Los Angeles, CA 90030

15 **WELLS FARGO BANK N.A.**
16 BDD Bankruptcy Dept MAC S4101-08C
100 W Washington St
17 Phoenix, AZ 85003

18 **Wells Fargo Bank, N.A.**
19 c/o Wells Fargo Card Services
Recovery Department
20 P.O. Box 9210
Des Moines, IA 50306

21 **Wells Fargo Bank, National Association as Trustee**
22 EMC Payment Processing
23 PO Box 660753
24 Dallas, TX, 75266-0753

25 **SPECIAL NOTICE:**

26 **First Street Commercial Mortgage Fund, LLC**
c/o Eric A. Nyberg
27 Kornfield, Nyberg, Bendes & Kuhner
1999 Harrison St., Ste. 2675
28 Oakland, CA 94612

1 **EMC Mortgage Corporation**

2 ATTN: Bankruptcy Dept.

3 P.O. Box 293150

4 Lewisville, TX 75029-3150

5 Loan No: ***** 5551

6 **American Express Centurian Bank**

7 c/o Becket and Lee LLP

8 P.O. Box 3001

9 Malvern, PA 19355-0701

10 **American Express Travel Related Services Co., Inc.**

11 c/o Becket and Lee LLP

12 P.O. Box 3001

13 Malvern, PA 19355-0701

14 **Loan Oak Fund, LLC**

15 c/o Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP

16 Attn: Simon Aron, Esq.

17 11400 West Olympic Blvd., Ninth Floor

18 Los Angeles, CA 90064-1565

19 **Countrywide Home Loans Servicing, Inc.**

20 c/o Richard J. Bauer, Jr., Esq.

21 Miles, Bauer, Bergstrom & Winters, LLP

22 1665 Scenic Ave., Ste. 200

23 Costa Mesa, CA 92626

24 **Sequoia Mortgage Capital**

25 c/o Patric J. Kelly, Esq.

26 Adleson, Hess & Kelly, APC

27 577 Salmar Ave., Second Floor

28 Campbell, CA 95008-1453

29 **Sequoia Mortgage Capital**

30 Jason H. Freskos

31 1114 Irwin Street

32 San Rafael, CA 94901

33 **Chrysler Financial Services Americas LLC**

34 **fka DaimlerChrysler Financial Services Americas LLC**

35 c/o Randall P. Mroczynski, Esq.

36 Cooksey, Toolen, Gage, Duffy & Woog

37 535 Anton Blvd., Tenth Floor

38 Costa Mesa, CA 92626

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